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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 747

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to review that Court's decision affirming separate judgments against each of the three Petitioners in United States District Court for the Northern District of Alabama, Southern Division.

OPINIONS BELOW.

The opinion below is reported at 288 F. 2d 759 (R. 1156, Appendix B).[1]. The opinion on rehearing, with the dissent of Judge Brown, is reported at 294 F. 2d 850 (R. 1276, Appendix C).[1] The companion case before the Interstate Commerce Commission, *Shaw Warehouse Co. v. Southern R. Co.*, is reported at 308 I. C. C. 609. The decision of the statutory Three-Judge District Court (N. D. Ala. 1960), affirming the Commission decision *sub nom. Southern R. Co. v. United States*, is reported at 186 F. Supp. 29 (Appendix D). The Pretrial order of the District Court for the Northern District of Alabama, in a suit by the United States under the Elkins Act to require collection of past and future rents at the levels established in the Commission order, and two other related cases, all set for trial on April 23, 1962, is set out in Appendix E.

JURISDICTION.

This Court has jurisdiction under 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals was entered on March 3, 1961 (R. 1196). Rehearing was denied on September 29, 1961 (Brown, J. dissenting) (R. 1297). On December 21, 1961, Mr. Justice Stewart entered an order extending the time for filing a petition for writ of certiorari until February 26, 1962 (R. 1298).

QUESTIONS INVOLVED.

1. Under the Interstate Commerce Act's prohibitions against special rates, rebates, unjust discrimination, concessions, undue preferences, and departures from pub-

[1] Because of numerous statements which Petitioners consider erroneous, the opinion is reprinted in a separate appendix with counsel's notes added in italics.

lished tariffs, can a common carrier by railroad, for the purpose of obtaining freight revenues:

a. Lease non-transportation facilities to shippers at rents which are less than compensatory and less than prevailing market rents for such facilities?

b. Guarantee shipper obligations in order to enable the shippers to obtain long term financing not otherwise available to the shippers?

c. Furnish working capital to shippers by permitting them to occupy railroad-owned facilities for extended periods of time without paying compensatory rents at least equal to prevailing market rents?

2. Is a decision of the Interstate Commerce Commission, affirmed upon judicial review, condemning the rental practices of a railroad as violations of the Commerce Act, binding in appellate court review of rulings by a trial court that the very same practices by the same railroad are, as a matter of law, not violations of the Commerce Act?

STATUTES INVOLVED.

This petition directly involves the following provisions of the Commerce Act as amended: Section 2 [49 U. S. C. § 2] prohibiting special rates, rebates, and similar devices; Section 3 (1) [49 U. S. C. § 3 (1)] prohibiting undue and unreasonable preferences and advantages; Section 6 (7) [49 U. S. C. § 6 (7)] prohibiting departures from tariff rates and prohibiting services or facilities not published in carrier tariffs. These statutory provisions together with Sections 8 and 9 of the Commerce Act [49 U. S. C. §§ 8 and 9], the provisions under which the suits below were filed, are reprinted, in pertinent part, as Appendix A to this Petition.

STATEMENT OF THE CASE.

Petitioners, Shaw Warehouse Company, Birmingham Ice and Cold Storage Company, and Boggs Cold Storage Company, were independent, public warehouse companies located within the railroad reciprocal switching district of Birmingham, Alabama (R. 445). Shaw Warehouse operated a "dry," i. e., non-refrigerated, food and general commercial storage warehouse (R. 248, 262). Birmingham Ice and Cold Storage and Boggs Cold Storage operated cold storage facilities (R. 389, 464). The present proceedings arise from complaints filed by each of Petitioners against Southern seeking damages under Sections 8 and 9 of the Commerce Act for injury to their businesses resulting from the special rebates and favoritism given to competing public dry and cold storage warehouses in Birmingham (R. 79-84, 56-70).

In 1954 Southern Railway began to promote a food and produce terminal development in Birmingham, Alabama, designed to capture for the Southern the rail freight traffic in food and produce in the Birmingham area. The plan involved the location of large shippers and receivers of food and produce at a point on the tracks of the Southern in Birmingham, beyond the reciprocal switching district, which could not be served by any other rail carrier. In order to induce the shippers to locate at the terminal, Southern proposed to make substantial property and financial contributions to the project and to guarantee the repayment of funds borrowed by the shippers to finance the construction of facilities specially and primarily designed for the storage and handling of food products. With this investment of its funds, property, and credit, the Southern expected to create such a concentration of food-handling activities that virtually all food and produce companies would be compelled to move to the new terminal. "Holdouts," according to Southern's Vice Pres-

ident in charge of the terminal promotion, would have to "join the parade or perish"—they would either move to the terminal or "wither on the vine" (R. 883-901).

The terminal facilities, which were to be owned by the shippers through a dummy real estate holding company, were expected to cost over $7,000,000.[2] Of this amount, almost $6,000,000 was to be furnished by Southern's guarantee of low interest first mortgage bonds to be issued by the dummy corporation; over $500,000 was to be contributed by the Southern; the balance was to be provided by a twenty to twenty-five year purchase-money second mortgage from the Southern itself (R. 11-18). The purpose of pledging Southern's credit to guarantee the $6,000,000 loan, according to Southern's Vice President, was to assure that the shippers "did not need any down payment and could do business on a 20 or 25 year basis with a major lender" (R. 1031).

Four competing railroads requested the Interstate Commerce Commission in September 1955 to investigate the activities of the Southern in promoting terminals in a number of cities of the South, including Birmingham. The Commission did not institute the requested investigation. However, the $6,000,000 loan commitment in Birmingham was withdrawn by the major lender because of its doubt as to the validity, under the Commerce Act, of Southern's guarantee of the shippers' obligations (R. 1030-1032). Without Southern's guarantee the shippers were unable to obtain financing for the projected facilities. It therefore became necessary for Southern, in order to create the facilities, to finance all of the construction costs directly. An agreement dated October 18, 1955, was made between Southern and the shippers under which Southern agreed to build, and the shippers to lease, the proposed facilities. The rental agreement further provided that in the event

[2] Actual costs amounted to over $8,000,000 (R. 1035-1036, 117-120, 241, 537).

the original financing plan was, at some unspecified future time, approved by public authority to the satisfaction of the Southern, the parties would revert to that plan[3] (R. 987-991).

The rental agreement provided for a rent based on a flat 8% of all costs except those to be borne directly by Southern under the original plan (R. 983-984, 975-976). Prevailing market rentals in Birmingham for such shipper facilities required an additional charge of at least 2% on the cost of facilities subject to depreciation, such as buildings and equipment (R. 547). It was undisputed that Southern did not charge this additional rent on the cost of buildings and equipment because the purchase provision of the agreement provided for a purchase at undepreciated original cost and the rents paid in the meantime would not be applied to the purchase price (R. 689-690).

The facilities were constructed by the Southern for shipper occupancy under this rental agreement in 1955-1956. Included were two large warehouse facilities: one, for cold storage, built for Birmingham Terminal Cold Storage Company; the other, for both cold and dry storage, built for Thomas N. Nelson & Company. These two facilities cost $2,400,000, exclusive of the value of land (R. 125-126), and were occupied in the summer of 1956 (R. 1005-1006). Neither of these shippers made any rent payment to Southern until May 1957, almost a year after the facilities were first occupied (R. 1024-1025). Nelson Company then "paid" 6 months rent by giving Southern

[3] Nothing in the October, 1955 agreement compelled or suggested that the Southern or its tenant shippers would take any action to obtain the approval of public authority. In fact, the only formal action ever initiated before the Commission concerning this agreement was the complaint filed by Shaw Warehouse Company with the Interstate Commerce Commission in July, 1957, which resulted in the decision of the Commission ordering the Southern to cease and desist from its program of rental favoritism. 308 I.C.C. 609.

a note, which was never paid (R. 1088). Nelson Company in fact paid only 2 months rent during the 26 months of occupancy of these facilities (R. 1102-1103). Terminal wholly failed to pay its last 8 months rent, and paid the remainder from 3 to 9 months in arrears (R. 24-26, 352-355). The combined unpaid rental arrearages of these two competitor warehouse companies, at the time of the trial, amounted to over $250,000 (R. 25, 1103). These warehouse companies used the funds, which otherwise would have been required to pay rents, to finance low storage rates and free services to warehouse accounts as a means of attracting business to the new terminal (R. 183, 261, 402, 1113). Both operated consistently at such great business losses that neither could ever pay the rent owed at any time during their occupancy from storage revenues; neither had sufficient capital to pay otherwise (R. 24-26, 356-358, 1100-1101).

Shaw Warehouse Company, in July 1957, filed with the Interstate Commerce Commission a formal complaint against the Southern under Section 13 of the Interstate Commerce Act. The complaint sought a declaration of the legality of Southern's practices at the terminal in Birmingham and a cease and desist order to prevent continued injury to the business of Shaw Warehouse Company as a consequence of Southern's practices (R. 87-92). These Commerce Act actions by Petitioners to recover damages to their businesses resulting from Southern's activities were filed in April and June 1958, in time to forestall the effect of the two-year statute of limitations provided for in Section 16 (b) (3) of the Interstate Commerce Act [49 U. S. C. § 16 (b) (3)]. The damage actions were reached for trial by the District Court in May 1959 (R. 104), almost six months before the Commission made its final determination on the complaint filed by Shaw, 308 I. C. C. 609. The District Court by pre-trial order directed that the three damage actions be consolidated for trial to this ex-

tent: The issue of Southern's liability was to be tried first in a joint jury trial; thereafter, if necessary, the damage issue would be submitted to the same jury in three separate trials, one for each Petitioner (R. 102).

At the trial on liability, undisputed evidence of the facts outlined above with respect to Southern's admitted freight procuring purpose, the original plan with its railroad-guaranteed financing, the rental agreement, Southern's rental computations, the prevailing market practice of including depreciation in rents, and the failure to collect rents from Petitioners' competitors, was produced before the jury. At the conclusion of the evidence, the issue of Southern's liability under the Commerce Act was submitted to the jury by the trial court with the following instructions of law:

1. There was nothing wrong with the guarantee by the Southern of the shippers' mortgage obligations provided in the original sales plan (R. 796).

2. Ordinarily a railroad is required to charge rents equal to fair market rents or compensatory rents, whichever is higher, but that, if the jury believed that Southern and the shippers intended to go through with the original sales plan, Southern could, in fixing rents, ignore the element of depreciation normally included in calculating either market or compensatory rentals (R. 793-794, 798, 800, 806, 825).

3. The only duty of a railroad in collecting rentals was to exercise due diligence under all the circumstances which the jury felt bore on that issue (R. 791, 799, 824).

Petitioners' exceptions to those instructions were overruled (R. 807-822, 827-829). The jury returned a verdict for Southern against Petitioners, upon which separate judgments were entered. After a motion for new trial had

been overruled (R. 833-866, 867). Appeals were taken to the Court of Appeals for the Fifth Circuit (R. 868-871).

In October 1959, over four months after the judgments were entered in the District Court, the Interstate Commerce Commission declared that Southern's rental charges and collection practices violated the Commerce Act, and ordered Southern to cease and desist from such practices. The Commission ordered the Southern to charge and collect rentals equal to not less than Birmingham market rentals, which the Commission found to be 8% on the value of the land and 10% on the cost of all improvements. *Shaw Warehouse Co. v. Southern R. Co.*, 308 I. C. C. 629, 636-637. Southern applied for a statutory three-judge court review of the Commission's order except with respect to its rental collection requirements. On July 18, 1960, in *Southern R. Co. v. United States*, 186 F. Supp. 29 (N. D. Ala. 1960), the Three-Judge Court (composed of Circuit Judges Rives and Tuttle and District Judge Lynne) affirmed the Commission's order. The Three-Judge Court held, *inter alia*, that: (a) The original sales plan necessarily involved an unlawful extension of railroad credit through the guarantee of loans to the shippers; and (b) Southern was required, in order to comply with the provisions of the Act, to charge and collect the higher of either compensatory rent or fair market rents. 186 F. Supp. at 37, Appendix D. And the Three-Judge Court expressly rejected Southern's argument that the amount of compensatory or market rental could be reduced by ignoring the element of depreciation because of an intention to revert to the sales plan at some future time. 186 F. Supp. at 38, Appendix D. The Southern did not appeal this judgment of the Three-Judge Court to this Court, as it had a statutory right to do under 28 U. S. C. § 1253.

The decision and order of the Commission in this companion administrative proceeding had been rendered and

affirmed by the Three-Judge Court prior to the initial decision on appeal by the court below. The court below, composed of Circuit Judges Hutcheson, Brown and Wisdom, affirmed the judgments (R. 1196, Appendix B), holding that the instructions to the jury challenged by Petitioners were entirely correct.[4] Petitioners sought rehearing, and rehearing *en banc*, in the Court of Appeals to reconcile the serious conflict on important legal issues under the Commerce Act between the decision of the Court of Appeals on the one hand and those of the Commission and of the Three-Judge Court on the other (R. 1201-1251). The petition was denied, with the majority of the Court of Appeals concluding that, while it had given "great weight" to the opinions of the Commission and the statutory three-judge court, "Still we must decide this case on the record before us and in the light of the law as we read it" 294 F. 2d at 852 (R. 1277). Judge Brown vigorously dissented from the refusal, on rehearing, to reverse the judgments of the District Court, 294 F. 2d at 853-859 (Appendix C).

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[4] The court below also suggests that, even if the jury charges were wrong on these issues, any error in the charge with respect to liability was cured because the jury might have decided, even though petitioners had been prohibited by the pre-trial order from proving the extent of their damages, that the Petitioners had actually suffered no injury capable of expression in dollars and cents. (See R. 783). If this should be construed as an independent ground of decision, this petition should be construed as presenting a third "question presented". Should an appellate court affirm a judgment, in a separate trial on the issue of liability, on the basis of a failure to prove damages in dollars and cents? Such a holding would violate Petitioners' right to a jury trial under the Seventh Amendment—it would constitute a holding that a jury trial in which a full trial of the issue of damages was not permitted, could be upheld for a failure of proof on that very issue. This would be contrary to cases such as *Smyth Sales v. Petroleum Heat and Power Co.*, 141 F. 2d 41 (3rd Cir. 1944), which hold that the Seventh Amendment right of jury trial extends to the issue of damages. See notes 3 and 5 to dissent of Judge Brown on rehearing, Appendix C, 294 F. 2d at 854.

REASONS FOR GRANTING THE WRIT.

A. Conflicts With Credit Extension Cases.

One of the freight buying schemes sometimes employed by railroads is the rental of facilities to favored shippers at less than cost or less than prevailing prices. Another is extension of credit to shippers so that such shippers are, in effect, permitted to employ as working capital the very life blood of every business engaged in the sale of goods or services—moneys currently owed to the railroad. The costs or losses incurred by reason of such reduced rents and credit extensions are written off by the railroad against freight revenues. The result is that the railroad receives, and the shipper pays, less than the railroad's published tariff charges of nonfavored shippers.

All of these devices have been uniformly condemned by this Court, by lower courts, and by the Interstate Commerce Commission under both the Commerce Act and its supplementary statute, the Elkins Act (49 U. S. C. [ ] 41 et seq.). As the Three-Judge Court stated, after reviewing

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(a) See Non-collection or delayed collection of amounts owed for credit: *United States v. Hocking Valley R. Co.*, 194 Fed. 234 (S. D. Ohio 1911), affirmed 216 Fed. 735 (6th Cir. 1914), cert. den. 234 U. S. 757 (1914); *United States v. Sunday Creek Co.*, 194 Fed. 252 (S. D. Ohio 1911), affirmed 210 Fed. 747 (6th Cir. 1914), cert. den. 234 U. S. 757 (1914); *Landalia R. Co. v. United States*, 226 Fed. 713 (7th Cir. 1915), cert. den. 239 U. S. 642 (1915); *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134 (1933), superseded by 216 I. C. C. 291, 305-306 (1936), affirmed 220 I. C. C. 102 (1937), sustained *Baltimore & Ohio R. Co. v. United States*, 20 F. Supp. 273 (D. Md. 1938), affirmed 305 U. S. 507 (1939), reaffirmed 241 I. C. C. 500 (1940), *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), affirming 32 F. Supp. 917 (W. D. Mo. 1940); *Practices of Carriers—Packing Sheds*, 246 I. C. C. 273, 286 (1941).

(b) Lease of facilities at less than cost or prevailing market rentals: *Cleveland, C. C. & St. L. R. Co. v. Hirsch*, 204 Fed. 849,

this consistent line of rental device cases, in *Southern R. Co. v. United States, supra*:

> "Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area, and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is higher. A carrier is prohibited from engaging in such noncarrier business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct." 191 F. Supp. at 17.

The rental devices employed by Southern in Birmingham were complex and devious, as shown by this petition and by the opinions below. However, if this Court will examine but three aspects of Southern's activities, the serious nature of the questions presented here will be apparent:

(1) Rentals charged were both less than compensatory and less than prevailing market rents because they failed to take into account the depreciation cost of furnishing the facilities.

(2) Depreciation costs were eliminated from rents by Southern on the theory that financially defunct

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352 853 (6th Cir. 1913); *Central of Georgia R. Co. v. Blount*, 238 Fed. 202 (5th Cir. 1917); *Leases & Grants by Carriers to Shippers*, 73 I. C. C. 671, 683 (1922); *Baltimore & Ohio R. Co. v. United States, supra*; *Union Pacific R. Co. v. United States, supra*.

(c) See also the following cases treating the absorption of construction costs and land acquisition costs: *United States v. Stock Yard & T. Co.*, 226 U. S. 286 (1912), reversing in part 192 Fed. 330 (Com. Ct. 1912); *United States v. General Motors Corp.*, 226 F. 2d 745, 748-749 (3rd Cir. 1955).

corporations intended to purchase the facilities in the future at full original cost, if the purchase money could be borrowed on the basis of the seller railroad's credit.

(3) Even the rents which excluded depreciation were not collected.

1. *Depreciation Costs Excluded From Rent*—Southern Railway purported to charge rents computed on the basis of 8% of all costs. Prevailing Birmingham rental practices necessitated a rent equal to at least 8% of the cost of land, and, in order to take depreciation cost into account, at least 10% of the cost of depreciable improvements such as buildings, machinery, and special equipment. Applied to the $2,000,000 of warehouse facilities Southern furnished Nelson Company and Terminal Cold Storage (R. 128-130), Southern's elimination of the 2% depreciation factor meant a rental reduction of $40,000 per year or $3,000 per month—no insignificant addition to working capital for a small businessman.

Both the opinion below (238 F. 2d at 771) and the jury charge (R. 703-704, 708, 801, 804-806) recognize that depreciation cost must normally be recovered in the rentals a railroad charges to a shipper. However, an exception was created by the courts below on the theory that if there is to be a future sale of the facilities at original cost, depreciation costs will be recovered at the time of such sale. Under these conditions the court below held, and the jury was instructed, that Southern need not charge

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8 Neither Nelson Company nor Terminal Cold Storage was even in business at the time of trial (R. 359, 630-641, 655-656). Both the remaining tenants and Southern, in an Elkins Act proceeding by the United States, seek to avoid payment of back rents at the levels set in the Commission order, and at the same time now maintain a right to purchase at present, or depreciated, value. See Pretrial Order (Civil Actions 9155, 9080, 9815, N. D. Ala.), Appendix E.

market or compensatory rentals. This same legal proposition was advanced by Southern in its effort to overturn the Commission order requiring Southern to include in its rent 10% of all construction costs for depreciable facilities. The Three-Judge Court flatly rejected Southern's proposition, holding:

> "Southern insists that in fixing its rental charges it was not required to take into account depreciation costs because, it contends, the tenants are obligated by the October, 1955, lease agreement to purchase the facilities at undepreciated cost. If this were true, and if the landlord was not a railroad leasing freight facility, there would be some logic in this position since its 8 percent rent would treat all of the costs as not being subject to depreciation in the same manner as the prevailing market rental formula treats land. However, such a rental formula would be the equivalent of an agreement by the railroad to postpone part of the rent to a future date, resulting in an unlawful loan or extension of credit similar to the extension of credit on delayed rent collections condemned by the Commission" (186 F. Supp. at 38).

The court below rejected the holding of the Three-Judge Court. Its rejection brought the opinion below into direct conflict with the decisions of at least two other Circuit Courts of Appeal, those for the Sixth and Seventh Circuits.

The Sixth Circuit condemned railroad extensions of credit to shippers in *Hocking Valley R. Co. v. United States*, 210 Fed. 735 (6th Cir. 1914), affirming 194 Fed. 234 (N. D. Ohio, 1911), cert. den. 234 U. S. 757 (1914). There the railroad followed a pattern of extending credit on freight bills, a practice which the District Court had said must strike "anyone of fair intelligence" as a method of granting shippers a substantial advantage over their com-

petitors by giving the shipper "the privilege to do business upon the capital of the carrier." 194 Fed. at 251. The Court of Appeals agreed that any such extension of credit to a shipper violated Section 6 (7) of the Commerce Act because it was "equivalent to providing for him working capital." 210 Fed. at 740.

In *Vandalia R. Co. v. United States*, 226 Fed. 713 (7th Cir. 1915), *cert. den.* 239 U. S. 642 (1915), the Seventh Circuit condemned loans to shippers. A railroad had loaned money to a shipper at an interest rate which was two percentage points below prevailing market interest, just as Southern charged rent based on a percentage of costs which was two percentage points below prevailing market rentals. The Court correctly held that the result was indistinguishable from those cases which condemned the charging of less than market rents to shipper tenants, *Cleveland C. C. & St. L. R. Co. v. Hirsch*, 204 Fed. 849, 852, 853 (6th Cir. 1913); *see also Central of Georgia R. Co. v. Blount*, 238 Fed. 202 (5th Cir. 1917). The Seventh reasoned that "a loan at less than the market rate of interest, like a lease at less than market value . . . is a gift of the difference," and as such constitutes a rebate, 226 Fed. at 717.

The Three-Judge Court held that Southern's exclusion of depreciation was controlled by these principles; the postponement of depreciation until a future purchase was in effect a loan at zero interest—and with no security for payment other than a promise to purchase if, and only if, the railroad itself could, under the Act, endorse the shippers' mortgage notes. Neither Nelson Company nor Terminal Cold Storage will ever repay that loan.

2. The Mortgage Loan Guaranteed by Southern—The holding of the Court below with respect to Southern's agreement to guarantee the mortgage obligation of the

shippers is obscured by the opinion below. At first reading it may appear that the opinion of the Court of Appeals holds that the legal propriety of the guarantee under the Commerce Act was a jury question which had been properly submitted to the jury for decision. 288 F. 2d at 773. The record shows, however, that the lawfulness of such a guarantee was not left to the decision of the jury. The trial judge treated the matter as an issue of law and, as such, instructed the jury that the guarantee by the Southern was lawful. The trial court's instruction was:

> "There was nothing wrong with guaranteeing a loan on the part of the Southern if the property was being sold for its fair value or cost to the railroad, there is nothing wrong with that" (R. 796; see 814-815).[7]

The Commerce Act prohibits such a guarantee because it represents still another way to grant a shipper an advantage at the railroad's expense. Any loss sustained by reason of such a guarantee must be borne by the carrier and offset against freight revenues. In practical effect the result is no different from that produced by a direct loan to the shipper since, by using the railroad's credit position, the shipper's available working capital need not be diverted to capital expenditures and its available cash is thus increased. This was clearly recognized by the Three-Judge Court when it held:

> "This financing plan with its otherwise unsecured second mortgage, and its first mortgage which is fortified by additional security of Southern's full guarantee of the obligations of each tenant, is merely a more complex form of credit extension such as those

[7] The opinion must be construed as approving this charge, both directly, 288 F. 2d at 762, and indirectly by its approval of the depreciation elimination proposition rejected by the three-judge court, 288 F. 2d at 772.

condemned in Vandalia R. Co., supra, Hocking Valley R. Co., supra; and, Propriety of Operating Practices—New York Warehousing, supra." (186 F. Supp. at 38).

And when the Court below rejected the holding of the Three-Judge Court, it again put its opinion in direct conflict with the Sixth and Seventh Circuit holdings in the *Vandalia* and *Hocking Valley* cases relied on by that court.

3. *Failure to Collect Rents*—The Commerce Act "condemns the means by condemning the end." *Hocking Valley R. Co. v. United States, supra*, 194 Fed. at 252. The courts below would measure Southern's rent collection practice by Southern's intentions, rather than by the resulting advantage enjoyed by the non-rent-paying tenants. It permits approval of the means without regard to this end product.

The fact is that, at best, Southern's rents for Petitioners' competitors excluded, as Petitioners have demonstrated, over $48,000 per year in depreciation costs. Even if measured by Southern's own no-depreciation rents, over $250,000 of rent owed the railroad was used by the tenant-shippers to finance their efforts to destroy Petitioners' business and move more freight traffic to Southern's terminal. And Southern's overriding freight motivation was not only admitted (R. 163), it was shown by Southern's own records: on the same day, Terminal Cold Storage was given a further rent extension because it had produced 216 carloads of freight; another tenant which had produced no freight was ordered evicted (R. 1040-1041). The practice of extending credit on rents was a freight-buying *means* which produced the very unlawful *end* which was condemned in the *Vandalia* and *Hocking Valley* cases. See 288 F. 2d at 774-775. Yet the courts below hold that Southern's rent collection delays

and failures were legally proper if the jury was satisfied that Southern had exercised due diligence, under the circumstances, in an effort to make collections.

The Court of Appeals appears to uphold this "due diligence" charge on the basis of an interpretation of the Section 3 (1) prohibition of "undue and unreasonable" preferences. But the charge measures the nature of the preference by Southern's "good intentions," rather than by the resulting advantages enjoyed by the shipper tenant; the charge ignores altogether Sections 2 and 6 (7). 288 F. 2d 774. Under Section 2 a carrier granting "any special rate, rebate, drawback, or other device," by which the carrier receives less from one shipper for a service than it receives from another, is by such conduct itself "deemed guilty of unjust discrimination." Section 6 (7) declares unlawful any deviation from tariff charges, and any extension of privileges or facilities not provided for by a published tariff. The "due diligence" charge constitutes a near revolutionary approach to Commerce Act construction. As Mr. Justice Holmes stated in *Lehigh Valley R. Co. v. United States*, 243 U. S. 445, 446 (1917), an allowance made to a shipper in order to secure freight traffic "however honest and however justifiable on commercial principles, would be contrary to the Act to Regulate Commerce." And in its most recent *railroad* rental practice case, *Union Pacific R. Co. v. United States*, 313 U. S. 450, 462 (1941), this Court stated, "Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention." By approving the "due diligence" test the Court below wholly disregarded these decisions.

No such rule has been applied by the regulatory body charged with the day to day administration of the Act. In *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291 (1936), a decision ultimately af-

firmed by this Court in *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507 (1939), the Commission stated:

> Obviously no independent warehouse could continue to sublease space or store goods at charges below cost. From January 1931 through March 1934, in no instance did the warehouse company make its monthly rental payments when due, the periods allowed to elapse ranging from 1 month and 25 days to 8 months. No payments had been made from April to October, 1934 . . . . If the warehouse company were an independent corporation competing with other warehouses it would clearly be unlawful for the Lackawanna to subsidize or grant concessions to it through the noncollection of rentals or leasing of space at noncompensatory rates or by similar means to bear a portion of the cost of its operation. (216 I. C. C. at 305-306.)

Under Commission decisions, a railroad has a positive duty to avoid circumstances which enable tenants to exact such concessions. In *Practices of Carriers—Packing Sheds*, 246 I. C. C. 273, 286 (1941), it was declared that when new facilities are constructed for shippers, a carrier must not only charge a rental "which will fully cover a fair return on value, plus taxes, insurance, depreciation and maintenance," but that a carrier should not construct such facilities at all "*unless there is assurance, with all reasonable certainty, that such rentals can and will be collected.*" See *Southern R. Co. v. United States*, *supra*, 186 F. Supp. at 37.

B. Conflicts With Primary Jurisdiction Cases.

This petition also presents important questions under the doctrine of "primary jurisdiction". If the credit extension issues concerning the depreciation exclusion, the mortgage bond guarantee, and the failure to collect rents

do involve questions of reasonableness, as held by the court below, they called for the type of quasi-legislative or expert administrative determination discussed by the Court in *Mitchell Coal & L. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-258 (1913). In such circumstances the Interstate Commerce Commission decision in *Shaw Warehouse Co. v. Southern R. Co., supra*, having been affirmed in *Southern R. Co. v. United States, supra*, would be binding upon Southern and all other persons affected, including especially the parties below. If these issues called for expert Commission judgment, the Commission's ruling should certainly have been followed by the Court of Appeals under *United States v. Western Pacific R. Co.*, 352 U. S. 59 (1956), as insisted by Judge Brown in his dissent. Such cases as *A. J. Phillips v. Grand Trunk W. R. Co.*, 236 U. S. 662, 665 (1915) and *National Pole Co. v. Chicago & N. W. R. Co.*, 211 Fed. 65 (7th Cir. 1914),[8] clearly hold that such Commission determinations are binding on all persons similarly situated, and on the courts, without regard to the applicability of *res judicata* or collateral estoppel.[9] Thus, if questions of reasonableness were involved in the decision below, the opinion is in conflict with basic decisions of this Court and with a decision of another circuit when it refuses to follow the Commission decision, as affirmed by the Three-Judge Court.

If, on the other hand, the trial court should have charged the jury that a failure to charge and actually collect the

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[8] Cf. Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500, 508 (1936).

[9] We submit that the fact that the damage suits here would not be *res judicata* against the United States and other parties in *Southern R. Co. v. United States, supra*, 186 F. Supp. at 41, does not prevent the application of doctrine in the *Shaw* or *Birmingham Ice* cases where every party was also a party before both the Commission and the Three-Judge Court, and where the same issues of rental amount, mortgage guarantee, depreciation elimination, and rental collections were clearly finally adjudicated between such parties.

higher of compensatory or prevailing market rents would, if proved, constitute a per se violation of the Commerce Act, as would any rebate or any other clear departure from published tariffs, the doctrine of primary jurisdiction would have no application. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 196-197 (1913). Petitioners would at least be entitled to a new trial because the trial court certainly submitted the issues in the case to the jury as if the legality of Southern's practices depended on a question of the reasonableness. Whether or not the issues below are such as to call into play the doctrine of primary jurisdiction, the opinion below decides important issues under the Interstate Commerce Act in a manner which is inconsistent with the prior decisions of this Court as demonstrated above.

C. Collateral Attack on the Commission Order.

The concession prohibitions of the Commerce Act with which these cases are concerned stand at the heart of the entire regulatory program of the Act. Rate regulation means little if persons in the position of Petitioners can be so easily deprived of its complete protection. Commission decisions on such practices are reduced to much ado about nothing if, even after final review, they can be collaterally overruled with respect to very persons most directly affected. Judge Brown described the opinion's effect in this manner:

> "It disregards altogether the right to recover damages as a sanction in the effectuation of an important congressional policy forbidding any and all kinds and types of discriminatory practices. Such a result frustrates the effectual enforcement of that policy. It leaves the body charged with responsibility of a continuing policing of that grand scheme with the power merely to make pious but academic declarations. True,

a cease and desist order could be entered but as these two proceedings demonstrate, that is thought to be a matter of little importance to the railroad. By practices condemned outright by the ICC and which it may no longer carry on, it has built a terminal which unlawfully favors the tenants. The deed is done" (294 F. 2d at 858, Appendix C).

Southern had already had one court review of the legal theories approved below. In the first review those theories were finally adjudicated and rejected by the Three-Judge Court. The court below treats that adjudication as a matter of no concern and places on the record a later decision which commends and approves the very same legal propositions so recently rejected. Southern is forbidden to continue its practices under one authoritative interpretation of the Commerce Act; Petitioners have been denied compensation for the destruction of, or severe damage to, their businesses on another diametrically opposite interpretation of the very same statutory provisions.

The theory of decision employed by the Court of Appeals, if generally followed, will convert every effort of an injured party to enforce his clear statutory right under Sections 8 and 9 into an opportunity for the offending railroad to mount an otherwise unavailable collateral attack on Interstate Commerce Commission decisions. Such disruption of the statutory scheme of regulation should not be invited by this Court. See note 15 to the dissent on rehearing by Judge Brown, 294 F. 2d at 859, Appendix C. It is impossible to conceive of the reverse of the situation below. If the Petitioners had succeeded below, and the Commission had then found the practices perfectly proper under the Commerce Act, the Commission decision almost certainly should, and probably would, prevail over such a damage judgment. Petitioners submit that the opinion below threatens an important and active field of regulation

in a manner which surely calls for this Court to seriously consider the need for exercising its supervisory powers, by granting the writ prayed for herein.

CONCLUSION

As demonstrated, this petition presents questions of continuing importance under the Interstate Commerce Act which have been decided in a manner which conflicts with prior decisions of this Court and of other Circuit Courts of Appeal and which should be authoritatively settled by this Court.

Petitioners therefore respectfully submit that for the reasons set out in this petition the writ of certiorari should be granted as prayed herein.

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